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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NATIONAL LABOR RELATIONS BOARD

and

YESHIVA UNIVERSITY FACULTY ASSOCIATION,
Petitioners,

v.

YESHIVA UNIVERSITY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE

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BRIEF OF AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE

INTEREST OF AMICUS *

The American Association of University Professors is a national professional organization of teachers and research scholars in all disciplines at accredited colleges and universities in the United States. It has approximately 1350 chapters and over 75,000 members in such institutions.

A substantial and growing number of the Association's chapters are, with the encouragement and support of the Association, engaged in collective bargaining with the administrations and governing boards of institutions of

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* All parties have consented to the filing of this Brief.

higher education. A substantial portion of the Association's resources are each year allocated to the support of Association chapters engaged in efforts to organize and engage in collective bargaining under the provisions of the National Labor Relations Act.

If a faculty's collective role in governance matters can deprive it of the protections of the National Labor Relations Act, as held by the court below, both of these activities are threatened. The legal status of ongoing collective bargaining relationships between faculty unions and the administrations and governing boards of privately supported institutions of higher education will remain uncertain if the decision below stands, as will the organizational rights of faculty generally.

The Association's chapter is a party in *Trustees of Boston University* v. *NLRB*, 575 F.2d 301 (1st Cir. 1978), *petition for cert. filed* (U.S. July 11, 1978) (No. 78-67).

INTRODUCTION

This is the first case to reach this Court involving faculty as employees under the National Labor Relations Act.[1] While the faculty employment relationship is substantially different from that which ordinarily confronts the Labor Board,[2] the factors impelling faculties toward

[1] In *Trustees of Boston University* v. *NLRB*, *supra*, the court of appeals enforced a Board order requiring that university to bargain with the faculty union certified by the Board; but in that case there was no contention that faculty, as a class, ought be excluded from the Act's coverage. In *NLRB* v. *Wentworth Institute*, 515 F.2d 550, 557 (1st Cir. 1975) the court of appeals rejected the employer's argument that faculty must be excluded from the Act's coverage.

[2] Though in passing the Act, Congress appears to have had industrial employment principally in mind, it is now far too late in the day to suggest that coverage is limited to the simpler employment relationships found in industry. By explicitly extending coverage to professional employees in the 1947 amendments to the Act, Congress made clear that no such limitation was intended. The Labor Board has ordered bargaining elections in units including a wide

collective bargaining are no different than those which move other employees in that direction, and it is important that this case be viewed with these factors in mind.

Like other employees, faculty are paid salaries which are set and modified by their employing institutions. In recent years the purchasing power of these salaries has declined measurably, and at a faster rate than that experienced by American workers generally:

> Until 1970-71, faculty salaries approximately kept pace with the increase in salaries of workers in general. Since then, they have fallen steadily behind. The average salary of all nonagricultural employees has risen 48 per cent since 1970-71; that of faculty members only 70 per cent as much. The performance of compensation (salary plus fringes) has been about the same: the national level of compensation has increased by 36 per cent more than that of faculty members since the beginning of the seventies. Dorfman, *Report on the Economic Status of the Profession 1976-1977*, 63 AAUP BULL. 146, 148-149 (1977).

This decline in the economic circumstances of America's faculties reflects to some degree the declining economic fortunes of higher education generally.[3]

variety of professions: lawyers (*Neighborhood Legal Services, Inc.*, 236 N.L.R.B. —— (No. 154) 1978 CCH N.L.R.B. ¶ 19,382 (1978)); laboratory technologists (*Permanente Medical Group*, 187 N.L.R.B. 1033 (1971); pharmacists (*Syosset General Hospital*, 190 N.L.R.B. 394 (1971)); architects (*Skidmore, Owings & Merrill*, 192 N.L.R.B. 920 (1971)); engineers (*General Dynamics Corp.*, 213 N.L.R.B. 851 (1974)); social workers (*Child & Family Service of Springfield, Inc.*, 220 N.L.R.B. No. 4 (1975)); computer programmers (*Loral Electronics Systems*, 200 N.L.R.B. 1019 (1972)); registered nurses (*Sutter Community Hospitals of Sacramento, Inc.*, 227 N.L.R.B. 181 (1976)); and newspaper editorial writers (*A. S. Abell Co.*, 81 N.L.R.B. 82 (1949)).

[3] *See e.g.*, E. CHEIT, THE NEW DEPRESSION IN HIGHER EDUCATION (1971); W. JELLEMA, FROM RED TO BLACK? THE FINANCIAL STATUS OF PRIVATE COLLEGES AND UNIVERSITIES (1973); Kemeny, *The University in Steady State*, DAEDALUS 87 (Winter, 1975).

As budget-cutting decisions are being made in higher education, faculty influence on institutional decision-making is perceived to be at a low ebb:

> A number of critical changes—the weakened job market, less research funds, and the encroachment of outside pressure groups—have diminished faculty influence over decision processes in most institutions. These changes have resulted in restricted budgets, frozen salaries, the elimination of departments, and the execution of major decisions over the strong objections of faculties that feel increasingly impotent. J. Baldridge, *et al.*, POLICY-MAKING AND EFFECTIVE LEADERSHIP 95 (1978).

These developments have resulted in administrative efforts to modify tenure and to take other steps to deal with financial problems—steps which have exacerbated the natural tensions in faculty-administration relations.[4] Not surprisingly, these developments have also spurred faculty interest in collective bargaining.[5]

Concern for job security, both in terms of protection against economic layoffs and protection against unfair dismissals, is central to collective bargaining in industry. It is of critical importance to the professoriate as well. The American system of academic tenure, underpinned by a widespread commitment to academic freedom,[6] has

[4] *See* KEMERER AND BALDRIDGE, UNIONS ON CAMPUS, Ch. 3 (1975); Metzger, *The American Academic Profession in "Hard Times,"* DAEDALUS 25 (Winter 1975); Kemeny, *The University in Steady State, Id.* at 87.

[5] "As long as the number of students continued to increase every year, jobs were plentiful, salaries were rapidly rising, and institutions were expanding both their facilities and services. Now, however, the massive boom has leveled off, and job security and salary increases have become prime concerns of faculty and are contributing to widespread unionization." UNIONS ON CAMPUS, *Supra*, at 38.

[6] 1940 *Statement of Principles on Academic Freedom and Tenure*, AUUP POLICY DOCUMENTS AND REPORTS, 1977 ed. at 1, *See Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957); *Keyishian* v. *Board of*

enjoyed uneasy and tepid support from some segments of higher education's administrative community.[7] Shrinking financial resources in higher education today pressure faculty job security at all levels. As institutions are increasingly uncertain of future growth, junior faculty find their prospects for achieving tenure exceedingly bleak.[8] At the same time, financially pressed administrators point to "financial exigency" or program discontinuance as grounds for dismissing tenured faculty without the usual need to demonstrate "cause." *Academic Freedom and Tenure: City University of New York—Mass Dismissals Under Financial Exigency*, 63 AAUP BULL. 60 (1977); *Academic Freedom and Tenure: The State University of New York*, 63 AAUP BULL. 237 (1977).[9] In this con-

Regents, 385 U.S. 589 (1967); cf. *Barenblatt* v. *United States*, 360 U.S. 109, 112 (1959):

> "When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into his constitutionally protected domain."

[7] *See e.g.*, "Job Crunch Spurs Debate on Tenure," N.Y. Times, Jan. 16, 1979, at C5; "Later Retirement Movement Fuels Concern over Tenure," Chronicle of Higher Education, April 17, 1978.

[8] *See e.g.*, "The Gypsy Scholars," Wall St. J., March 13, 1979, at 1. *See also* note 9, *infra*.

[9] The causes and consequences of administrative hostility to faculty tenure have been described by one commentator as follows: "It has long been assumed that tenure gives a strong measure of job security, but there is increasing concern that tenure will be undermined by institutions trying to maintain some staffing flexibility. The problem is serious: the percentage of faculty members holding tenured positions at colleges and universities rose from 47 percent in 1969 to 65 percent in 1973. The Carnegie Commission on Higher Education estimates that in the 1980s over 80 percent of full-time faculty members will have tenure if present policies continue. *Under these circumstances, it is not surprising to find legislators, trustees, and administrators attacking tenure and to find faculty members increasingly suspicious about the real reasons that tenure is not granted.* Some of the critics point out that, given pressures to economize, keeping down the number of tenured positions is not simply a way to maintain staffing flexibility but is actually a way

text both tenured and untenured faculty have sought protection in the courts with little success.[10] It is no wonder, then, that they have turned to collective bargaining as the best hope of protecting both their jobs and their role in the institutional decision-making process.[11]

This case reached the court below on the petition of the National Labor Relations Board (hereafter "Board" or "Labor Board") to enforce its order requiring Yeshiva University to recognize and bargain with the Yeshiva University Faculty Association, which had decisively won a Board-supervised collective bargaining election. The validity of the Board's underlying unit determination was challenged by the University.

The court of appeals analyzed the governance patterns at each of ten divisions of the University and found that the faculty, frequently operating through committees chaired by administrators, regularly make recommen-

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to effect considerable savings, especially if a permanent revolving pool of low-paid nontenured faculty is available. . . .

"A general mistrust of authorities fuels faculty suspicions about tenure policies. Under pressure to trim budgets, administrators are more inclined than ever before to disregard faculty recommendations." UNIONS ON CAMPUS, *supra*, 46-47. (Citations omitted, emphasis supplied.)

[10] *Scheuer* v. *Creighton University*, 199 Neb. 618, 260 N.W.2d 595 (1977); *Johnson* v. *Board of Regents*, 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd*, 510 F.2d 975 (7th Cir. 1975) (table); *Levitt* v. *Board of Trustees*, 376 F. Supp. 945 (D. Neb. 1974); *Krotkoff* v. *Goucher College*, 585 F.2d 675 (4th Cir. 1978). *Cf. American Association of University Professors* v. *Bloomfield College*, 129 N.J. Super. 249, 322 A.2d 846 (Ch. Div. 1974), *aff'd*, 136 N.J. Super. 442, 346 A.2d 615 (App. Div. 1975); *Browzin* v. *Catholic University*, 527 F.2d 843 (D.C. Cir. 1975).

[11] "Unionization for [faculty] is more a protective than an aggressive act, more an effort to preserve the status quo than to achieve a new position of influence and affluence as has so often been the goal of unionization for other groups at an earlier time." CARNEGIE COMMISSION ON HIGHER EDUCATION, GOVERNANCE OF HIGHER EDUCATION 40 (1973).

dations to the University in a number of important areas: the appointment, reappointment, promotion and tenure of their faculty colleagues, curriculum matters, the establishment or revision of admission and degree requirements, grading standards, and tuition levels. The court further found that these recommendations were usually accepted by the University's administration or governing board. Concluding from these findings that the faculty at Yeshiva "are, in effect, substantially and pervasively operating the enterprise," 582 F.2d at 698, the court of appeals held that Yeshiva's faculty are "managerial" or supervisory employees and denied enforcement.

Although the court below characterized the faculty actions at Yeshiva as "decisions," it is plain from the record that the faculty make decisions only to the extent that they decide what to *recommend* to the administration and governing board.[12] Their "authority" entails the

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[12] There can be no dispute that in the area of faculty personnel matters, the faculty actions consist of recommendations passed up through the deans to higher administrative authority. The court of appeals' decision itself makes this clear. In other areas (e.g., curriculum, grading and admission standards), while the court frequently characterizes the faculty actions as definitive, they become so only upon approval by the administration. For example, the court describes the testimony of Leo Landman, acting dean of the Bernard Revel School, as follows:

> "Landman testified that decisions on curriculum, admissions requirements, degree requirements, and course offerings were made by consensus of the faculty. Landman further testified that the faculty's decisions were *generally given effect*." 582 F.2d at 694. (Emphasis supplied.)

Similarly, in describing the authority of the "senior professors" at Yeshiva College, the court below asserts:

> "[S]enior professors largely *determine* the budget of their subject area. The budget *requests* of the senior professors receive perfunctory approval . . . "99 per cent" of the time." 582 F.2d at 691-2. (Emphasis supplied.)

And in stating its conclusions the court of appeals commented that

> "[T]he faculty has *initiated*, and the administration has repeatedly *accepted*, major policy determinations which constitute the essence of the University's educational venture." 582 F.2d at 701. (Emphasis supplied.)

frequently effective exertion of influence as informed professionals on management. In effect, then, the court of appeals held that the influence of every Yeshiva faculty member on management was such as to make him a "manager." [13]

While we believe that in its treatment of the record the court of appeals over-reached its authority under the "substantial evidence" test, *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 (1951),[14] as *amicus* we take it as

[13] In order to sustain the court of appeals' holding, it is necessary to conclude that the entire faculty, even including the most junior instructor, exercise enough authority to be found "managerial" or supervisory, even those in colleges where the "senior professors" or departmental chairmen are acknowledged to exert most of the influence. (Stern College, 582 F.2d at 691; Yeshiva College, 582 F.2d at 691-2; Ferkauf Graduate School, 582 F.2d at 693; Bernard Revel Graduate School, 582 F.2d at 694. These schools account for more than half of Yeshiva's full-time faculty. 582 F.2d 690 n.6.) With respect to the chairmen, the court remarked on the Board's holding that they were not managerial or supervisory because their authority was diffused among their colleagues whose interests they represented. It found this inconsistent with the Board's further conclusion that the collective influence of the faculty did not make them "managerial employees." 582 F.2d at 703. But even assuming that the Board decision on the status of the chairmen is incorrect, it does not follow that their resulting supervisory or "managerial" status should be extended to all departmental faculty, simply because the chairmen consult them before making recommendations to the administration. It could hardly be supposed, for example, that a foreman could convert those working under him into supervisory or "managerial employees" by conveying their interests and concerns to management, even if management thereafter acted on those concerns.

[14] The court of appeals' treatment of these factual issues is illustrated by its findings with regard to the faculty role in tuition matters. The court found that "in particular cases . . . the tuition to be charged [is] *controlled* by the full-time faculty." 582 F.2d at 696. (Emphasis supplied.) This finding was based on a single incident in which the Acting Dean of one of Yeshiva's divisions recommended a $500 increase in tuition which was rejected in favor of a

factually correct that the faculty at Yeshiva regularly, and through a variety of means, make recommendations to the administration and governing board in a number of important areas, and that these recommendations are frequently accepted.[15] We do not believe that this is sufficient to make them "managerial employees" outside the protections of the Act.[16]

SUMMARY OF ARGUMENT

The Board-developed "managerial employee" exclusion extends to individuals who are closely "aligned with management" and who possess independent discretion to "formulate, determine and effectuate" management policies. The court below has improperly extended this exclusion to employees who simply exert a high degree of

$300 increase supported by the faculty. 582 F.2d at 693. *Cf.* Labor Board Petition for Certiorari, at p. 11. Similar inferences are drawn by the court of appeals throughout its opinion. The court's ultimate inference that the Yeshiva faculty are "operating the enterprise" is based on nothing more than facts showing that faculty advice on a variety of important matters is widely accepted by higher authority.

[15] The record reflects as well frequent instances in which faculty recommendations were rejected. *See* Union Petition for Certiorari, at 34-37. These instances were ignored by the court of appeals.

[16] We concentrate our argument on the court's finding of "managerial" status. We believe that the conclusion that the entire full-time faculty are supervisors as well is patently incorrect. The Board's conclusion that the definition of "supervisor" contained in section 2(11) of the Act extends only to *individuals* with authority over non-supervisory employees is a reasonable one. Thus read, the definition cannot be applied to an entire and discrete group of employees whose alleged supervisory authority is exercised almost entirely within the group. *Cf. Mourning* v. *NLRB*, 559 F.2d 768 (D.C. Cir. 1977). The court of appeals did not really disagree with the Board's view that section 2(11) cannot be applied to groups. Rather it held that there is nothing to prevent a finding that an entire group of employees are "managerial." 582 F.2d at 698-700. Oddly, the court nonetheless persisted in holding the faculty also to be supervisors, thus treating these related but discrete concepts as virtually fungible.

influence on management. In so doing it has imported a standard which will disrupt the administration of the National Labor Relations Act and interfere as well with the Act's notion of the "private ordering" of labor-management relations.

The court's test requires the Labor Board to condition access to bargaining rights on the level of pre-existing employee influence. At the same time the test imposes substantive limits on the provisions employees may seek to negotiate without running the risk of bargaining themselves out from under the Act's protection. The court's test is particularly inappropriate in the light of the Act's explicit coverage of professional employees whom Congress plainly understood to be unusually influential employees.

Though frequently exercising a high degree of influence on the terms and conditions of their employment and on matters of educational policy, the faculty employed at Yeshiva and elsewhere do not fit the Board's definition of "managerial employees." First, this influence flows directly from their status as professionals. Because of their highly specialized expertise, faculty are generally accorded great autonomy in the performance of their teaching and research responsibilities, and higher education management frequently relies on their judgment in a wide variety of critical areas.

Second, faculty are not held accountable for the performance of "managerial" functions. The faculty's "job responsibilities" are to teach and to carry out research. Their authority and influence stem from these responsibilities and not from any delegation of authority or responsibility from their governing board.

Finally, faculty lack the alignment with management required by the Board's definition. In fact, the faculty role depends for its efficacy on a marked independence

from management—understood as an institution's administration and governing board. This independence is essential to the faculty's academic freedom and frustrates any attempt to label the faculty as part of any "management team."

I. The Measure Of Employee Influence On Management Is Not A Proper Test Of Managerial Status Under The Act.

A. *Employee Influence On Managerial Decision-Making Has Never Been Deemed Sufficient, By Itself, To Warrant Exclusion From The Protections Of The Act.*

The Labor Board has defined "managerial employees" as "those in executive-type positions" who act from a position closely "aligned with management as [its] true representatives," and who possess substantial and independent discretion to "formulate and effectuate management policies." *General Dynamics Corp.*, 213 N.L.R.B. 851, 857 (1974). See also *Bell Aerospace Co., on remand*, 219 N.L.R.B. 384, 385 (1975); *Palace Laundry Dry Cleaning Corporation*, 75 N.L.R.B. 320, 323 (1947); *Eastern Camera and Photo Corp.*, 140 N.L.R.B. 569, 572 (1963).[17] This Court approved the Board's definition in

[17] In its earlier cases the Board frequently dealt specially with certain employees who discharged substantial responsibilities for their employers. When it found that such employees were "closely related to . . . management," *Julien P. Friez & Sons*, 47 N.L.R.B. 43, 47 (1943), it reasoned that to include them in bargaining units with employees lacking similar responsibilities would place them in a conflict of interest position. In so doing, the Board often labeled the excluded employees "managerial." *See e.g., Dravo Corporation*, 54 N.L.R.B 1174, 1177 (1944); *Vulcan Corporation*, 58 N.L.R.B. 733, 736 (1944); *Julien P. Friez & Sons, supra*. The Board subsequently refined its definition of "managerial employees" to include not only those individuals whose inclusion in a bargaining unit of "rank-and-file" employees would present a conflict of interest, but also those who "are in a position to formulate and effectuate management policies . . . [by] express[ing] and mak[ing] operative the decisions of management." *Ford Motor Co.*, 66 N.L.R.B. 1317, 1322 (1946).

NLRB v. *Bell Aerospace Co.*, 416 U.S. 267, 288-89 (1974).[18]

Neither the Board nor the other courts of appeals have ever intimated that influence on management is, by itself, a sufficient basis for a finding of managerial status.[19] The Board's test, depending as it does on a finding of close "alignment with management," is not satisfied by mere employee influence on management—even influence which is frequently effective. The Board's definition plainly contemplates that "managerial employees" are individuals who are hired by "management" to make "management" decisions and who are held accountable for this activity.[20] Employees who do no more than press

[18] The courts of appeals have also approved the Board's definition. *See e.g. Retail Clerks International* v. *NLRB*, 366 F.2d 642, 645 (D.C. Cir. 1966), *cert. denied*, 386 U.S. 1017 (1967); *International Ladies Garment Workers Union* v. *NLRB*, 339 F.2d 116, 123 (2d Cir. 1964); *NLRB* v. *Retail Clerks, Local 876*, 570 F.2d 586, 592 (6th Cir. 1978); *NLRB* v. *Pope Maintenance Corp.*, 573 F.2d 898, 908 (5th Cir. 1978).

[19] Even in its early decisions, relying on the "conflict of interest" definition, the Board generally held an individual to be "managerial" only when he had the authority to act for and bind the employer, as by making purchases or extending credit. *See e.g., Plankinton Packing Co.*, 116 N.L.R.B. 1225 (1956); *Denton's Inc.*, 83 N.L.R.B. 35 (1949); *Vulcan Corporation, supra; J. L. Brandeis & Sons*, 54 N.L.R.B. 880 (1944). Employees who have exerted their influence on their employers, or who have been in a position to make important recommendations have not, on the strength of that alone, been held "managerial." *See Illinois State Journal Register* v. *NLRB*, 412 F.2d 37, 42 (7th Cir. 1969), in which the court held a newspaper's "district men" non-managerial. The court observed that "the extent of the district man's relation to and influence on major company policies is limited to making recommendations to the company with respect to its policies and future plans." *See also Westinghouse Electric Corp.*, 113 N.L.R.B. 337 (1955).

[20] As this Court said in *Bell Aerospace, supra*, "[T]he question whether particular employees are 'managerial' must be answered in terms of the employees' actual job responsibilities, authority and *relationship to management*." 416 U.S. at 290 n.19. (Emphasis supplied.)

their advice on their employer and thereby achieve some level of influence over his decisions lack this central ingredient.[21] Moreover, the frequency with which management follows employee advice does not operate to bring those employees under the "managerial" rubric. Advice is no less advice when it is taken.

There is no sound reason that employees whose expertise makes them highly influential but who are not charged with explicit "managerial" responsibility, should be denied the statutory right to engage in collective bargaining as a means of improving their conditions of employment. Their seeking to bargain collectively over "wages, hours and other terms and conditions of employment" presents no necessary conflict of interest problems, since, lacking any "alignment with management," their unionization does not deprive management of "loyal representatives." [22]

[21] We do not, of course, contend that "managerial" status depends on unilateral decision-making authority, or that participation in management decision-making may not result in such status. To be sure, corporate executives, and other plainly "managerial" personnel, do not always possess such unilateral authority. Management decisions are increasingly made by groups of people each of whom is simply a participant in the process. But such personnel are directly charged with responsibility to so participate and are held accountable by management for their performance in this regard. Such accountability for the exercise of "managerial" responsibility is plainly lacking in the case of faculty influence, which is exerted from a position of independence from management. See discussion under part II.A, pp. 26-27 *infra*. It is also lacking in the case of professional employees generally, whose influence results directly from their expertise, rather than from hierarchical position or delegation of responsibility or authority from management. *See* discussion under part I.C, pp. 22-26 *infra*.

[22] In excluding supervisors, viewed as the "front line of management," S. REP. No. 105, 80th Cong., 1st Sess. 7 (1947), Congress intended to protect the right of both labor and management to their "loyal representatives." H.R. REP. No. 245, 80th Cong., 1st Sess. 16 (1947). To the extent "influential" employees are sought to be included in the same unit with employees lacking such influence, there may be some danger of combining conflicting interests. But

This Court's decision in *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267 (1974) does not support the more expansive "influence" test employed by the court below. *Bell Aerospace* simply held that the then-recent attempt by the Board to limit the "managerial employee" exclusion to employees with authority over labor relations matters threatened the unionization of corporate "executives," those who are "much higher in the managerial structure" than supervisors, and who Congress plainly intended to exclude from coverage. 416 U.S. at 283.[23] Concerned that the Board's new interpretation would "eviscerate the traditional distinction between labor and management," 416 U.S. at 285 n.13, the Court remanded the case to the Board with instructions that it return to its established definition.

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these difficulties can be avoided by application of the Board's "community of interest" standards independent of the "managerial employee" exclusion. *Cf. NLRB* v. *Bell Aerospace Co.*, 416 U.S. at 290 n.20 ("To be sure, it would also be appropriate for the Board to exclude employees from a unit on the ground that their participation in a labor organization would create a conflict of interest with their job responsibilities.")

[23] Thus the Court observed:

> "A major company, for example, may have scores of executive officers who formulate and effectuate management policies, yet have no supervisory responsibility or identifiable conflict of interest in labor relations. If Congress intended the unionization of such executives, it most certainly would have made its design plain." 416 U.S. at 289 n.18.

In this regard the majority in *Bell Aerospace* reflected the concern voiced by Justice Douglas, dissenting in *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 494-495 (1947) that the extension of bargaining rights to supervisors would blur the distinction between labor and management, thereby revising common notions of industrial organization in a manner not intended by Congress. Justice Douglas feared that all employees, from the janitor to the company president, would be deemed "labor," free to bargain with the company's governing board or stockholders. By contrast, the test employed by the court below offers the hardly hypothetical prospect that, in a variety of circumstances, entire faculties, of hundreds and even thousands, by virtue of varying degrees of influence on their employer's policies, will be deemed "managerial employees" outside the Act's protection.

B. *The Use Of Employee Influence As A Test Of Managerial Status Will Needlessly Disrupt The Administration Of The National Labor Relations Act.*

One of the principal purposes of the National Labor Relations Act is to afford American employees the choice of engaging in collective bargaining as a means of enhancing their influence on their employers. In furtherance of this aim the Act has established a "process [which] . . . ensure[s] that employees as a group [can] express their opinions and exert their combined influence over the terms and conditions of their employment." *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99, 103 (1970). Fundamental to this process are the notions of employee free choice and the "private ordering" of the employer-employee relationship.[24] Leaving to the employees themselves the choice of whether or not to engage in collective bargaining, the Act also leaves the parties substantially free to order their own relationship free from government interference. "So far as the Act itself is concerned [the terms of the relationship] may be as bad as the employees will tolerate or be made as good as they can bargain for." *Terminal Assn.* v. *Trainmen*, 318 U.S. 1, 6 (1943).

Avoiding direct regulation of the employer-employee relationship, the Act rather encourages joint employee-management participation in setting the terms of the relationship, and in resolving the disputes which arise between them; and "the extent of union and management participation in the administration of such matters is itself a condition of employment to be settled by bargain-

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[24] "Free collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA. . . . [Congress] sought to leave labor and management essentially free to bargain for an agreement to govern their relationship." *New York Telephone Company* v. *New York State Department of Labor* (Powell J., dissenting). —— U.S. ——, 45 USLW 4303, 4311 (March 21, 1979).

ing." *NLRB* v. *American Nat'l Insurance Co.*, 343 U.S. 395, 409 (1952). This federally encouraged system of "free collective bargaining" presumes a malleable definition of "management prerogative," changing with the dynamics of the bargaining process and the judgment of the parties themselves.[25] Prior to collective bargaining the role of management in establishing the working conditions of its employees and in generally ordering the priorities of the enterprise is frequently unfettered.[26] With the advent of collective bargaining this usually changes, with many matters formerly within management's exclusive domain now settled by bilateral agreement. For this reason it must be of limited significance, in assessing the consequences of employee influence, that

[25] In *NLRB* v. *The Catholic Bishop of Chicago*, —— U.S. ——, 47 USLW 4283, 4285 (March 21, 1979) this Court approved a holding in which the constitutional problems presented by N.L.R.B. jurisdiction over parochial schools were contrasted with the "interference with management prerogatives found acceptable in an ordinary commercial setting."

[26] As David Feller has observed, however, there are in fact significant employee-generated limits on arbitrary managerial authority even in unorganized enterprises: "Collective bargaining is not, then, the occasion for *introducing* rules into the employment relationship. It is, rather, *a method by which employees participate* in what would otherwise be a system of unilateral management rulemaking and administration." Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 724 (1973) (Emphasis supplied.) Moreover, employee influence on "management" decisions is quite compatible with modern theories of management. As one commentator has observed:

> "The new managerial theories postulate that the employee's intimate knowledge of actual conditions at his work place puts him in a position to contribute constructively to the organization of operations and that allowing him to participate in the decision-making process will encourage a more active identification with the workplace and stimulate productivity." J. Bonanno, *Employee Codetermination: Origins in Germany, Present Practice in Europe, and Applicability to the United States*, 14 HARVARD JOURNAL ON LEGISLATION 947, 998 (1977) (Emphasis supplied.)

the areas of such influence include matters normally considered "managerial."

The "managerial employee" exclusion declared by this Court in *Bell Aerospace* is consistent with the foregoing statutory scheme insofar as it serves the limited purpose of preserving the integrity of the bilateral process contemplated by the Act. The Board's definition serves this purpose by extending the exclusion a short distance beyond the inner circle of management to those individuals who—though not part of this circle—are nonetheless closely "aligned" with it and vested by it with substantial authority. By focussing instead on employee influence, the court below cuts this limited exclusion loose from its moorings and compels the Labor Board to assess the substance of the employer-employee relationship in a manner nowhere contemplated by the Act. In practical effect, it held that bargaining rights under the Act are limited to employees having little or no influence at the time they seek to assert those rights.

The court below held that the influence of the Yeshiva faculty over their conditions of employment as well as over matters of educational policy ousts them from the Act's protection. In effect, it held that they did not need that protection. But the Act places the right to make this judgment in the employees themselves through the device of a Board-supervised representation election. Higher education employers are free, as are their industrial counterparts, to campaign against collective bargaining among their faculty and to argue that the faculty's influential position does not warrant resort to collective bargaining. The record of faculty collective bargaining elections confirms that many of them have been fought out on precisely these issues.[27]

[27] *See* Bodner, The "No Agent" Vote at N.Y.U.: A Concise Legal History, Academic Collective Bargaining Information Service ("ACBIS") Special Report No. 9, at 16 (1974):

[Footnote continued on page 18]

Moreover, the court of appeals' test interferes with the principles of "private ordering" which are central to the Act.[28] It imposes limits on the substantive provisions which faculties and other employees may negotiate into their labor agreements without risking loss of the very right to bargain under the Act. Employees may well seek to negotiate into their labor agreements procedures for employee participation in employer decision-making. Certainly the Act itself imposes no constraints on such efforts. To the extent employees are successful in this regard, there may be no difference in the level of influence thereby achieved from that found by the court below sufficient to oust the Yeshiva faculty from the Act's coverage.

This is more than just speculation. Since the Board extended jurisdiction to private higher education in 1970, *Cornell University*, 183 N.L.R.B. 329, the faculties of more than seventy-seven such institutions have organized and entered into formal collective bargaining relationships with their administrations and governing boards.[29] The

[27] [Continued]

"Advantageous conditions already achieved by the faculty in terms of economics, status, and governance authority were described by the administration."

See also Reiss, *Collegiality or Unionization: The Fordham Election*, in THE EFFECTS OF FACULTY COLLECTIVE BARGAINING ON HIGHER EDUCATION, 37 (R. HEWITT, ed. 1973); Lussier, *Albion College Votes "No Agent": A Case Study*, ACBIS Special Report No. 7 (undated).

[28] H. WELLINGTON, LABOR AND THE LEGAL PROCESS, pp. 49 *et seq.* (1968).

[29] The Chronicle of Higher Education, June 26, 1978, p. 8. *See also* ACBIS Special Report No. 12, April, 1978. In addition, the faculties of more than 500 state supported institutions of higher education are organized and currently engaged in collective bargaining under state-enacted public sector bargaining laws. *Id.* Most of these state laws are modeled on the National Labor Relations Act. *See e.g.*, Conn. Gen. Stat. § 31-101 *et seq.* (1972 ed. and 1978 Supp.); Minn. Stat. § 179.61 *et seq.* (1979 Supp.); N.J. Rev. Stat. § 34:13A-1 *et seq.* (1978 Supp.); Pa. Stat. Ann. tit. 43, § 1101.101 *et seq.* (1978 Supp.) (Purdon).

agreements negotiated by these faculties[30] frequently provide for extensive faculty involvement in decisions relating to the appointment, reappointment, promotion and tenure of their colleagues.[31] Many of these agreements also establish procedures for the exertion of influence on decisions relating to matters of educational policy: the setting of curriculum, the establishment of degree and admission requirements, budgetary matters, long-range planning, and even the formulation of capital improvement plans.[32] This expanded definition of "managerial" status confronts these faculty unions with the prospect of losing the protections of the Act by the fact of their success alone.[33] Having bargained too well, they may have bargained themselves out of the right to bargain under the Act.

[30] In our Brief *Amicus* in support of the Board's Petition for Certiorari we included an Appendix summarizing the provisions of twenty collective bargaining agreements negotiated by faculty unions at privately supported institutions of higher education. For convenience, that Appendix is also included at the end of this Brief.

[31] *See* Appendix at pp. A-7—A-10. Faculty involvement in these matters is plainly at the heart of their "conditions of employment" over which they would ordinarily be free to compel bargaining under the Act. *Cf. NLRB* v. *Wooster Div. of Borg-Warner*, 356 U.S. 342 (1958); *National Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940).

[32] *See* Appendix at pp. A-1—A-6.

[33] Faculty are not the only employees who have used collective bargaining to enhance their influence on their employer. For example, agreements negotiated by organized nurses frequently provide for employee participation in decisions relating to the general improvement of patient care—an area closely related to their professional expertise but also central to the responsibility of hospital management. *See e.g.*, Employment Agreement Between Southwest Washington Hospital Council and the Washington State Nurses Association (Bureau of Labor Statistics No. 551759), Articles XVII, XVIII; Agreement between the Associated Hospitals of San Francisco and the East Bay and the California Nurses Association (BLS No. 7974) Article XXIII. Symphony orchestra musicians have negotiated agreements providing for musician participation, and sometimes control, over the hiring and firing of their colleagues. Some of these agreements provide as well for musician

If the decision below may not fairly be read as attaching to "negotiated influence" the same consequences as to "consensual influence," [34] its necessary effect is to require employees to choose between the two. For if employees like the Yeshiva faculty achieve a substantial level of influence on management through means other than formal collective bargaining, they may well be deemed "managerial employes," foreclosed thereafter from engaging in collective bargaining under the Act. This would clearly be unwarranted. For employees who influence management decisions may still see collective bargaining as the more effective means for dealing with their employers on issues more directly relating to "wages, hours, and other terms and conditions of employment."

Finally, the decision below imposes on the Board and on faculty employed at privately supported institutions of higher education a legal standard which is impossible to administer and which will inevitably result in unstable relations between faculties and the administrations and governing boards at such institutions. If the decision below stands, the rights of faculty to engage in collective bargaining under the NLRA will depend not on an evenly applicable rule of law, but rather on shifts in the climate

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participation in the selection of orchestra conductors and for some degree of "artistic control." *See e.g.*, Articles of Agreement Between Houston Symphony Society and Houston Professional Musicians Association, Local Union No. 65, American Federation of Musicians (BLS No. 541803) Articles V, VII, VIII, XIII, XXIV; Agreement Between San Francisco Symphony Association and Musicians Union of San Francisco, Local No. 5, American Federation of Musicians (BLS No. 550372) Article XVII; *cf. Bures* v. *Houston Symphony Society*, 503 F.2d 842 (5th Cir. 1974).

[34] This would surely be anomalous, since "negotiated influence" is fixed by a legally binding agreement, while "consensual influence" can be modified by the unilateral action of an institution's governing board.

of institutional relationships.[35] The burden this places on the Board and the parties is obvious. It will require a complex fact-finding process in every case to determine whether faculty are covered employees. The Board will be required to assess in each case the extent of faculty participation in governance matters, and the degree to which an institution's administration and governing board abide by faculty recommendations.

Faculties with little or no influence will be accorded bargaining rights. Thereafter, they will seek to increase their influence. If they are too successful, their bargaining rights may well be placed in jeopardy. Conversely, an influential faculty, denied bargaining rights by reason of that influence, may see its influence decline. It could well be that a new administration or governing board could choose to dispense with the faculty advice which had strongly influenced the actions of their predecessors, and thus strip the faculty overnight of their "management" status. Presumably, the faculty could then petition the Board again for bargaining rights, this time successfully.[36] The rights conferred by the National Labor Relations Act should not be made to rest on such shifting sands.

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[35] "The areas of decision-making in which the faculty, as individuals, as groups (committees or departments), or as a whole—is granted an opportunity to participate vary from institution to institution, as tradition, the aggressiveness of the faculty, and the nature and attitudes of the president and trustees dictate." J. CORSON, THE GOVERNANCE OF COLLECTIVE AND UNIVERSITIES, 239 (1975). *See also* Finkin, *Collective Bargaining and University Governance*, 57 AAUP BULL. 149 (1971).

[36] The Act bars the conduct of a collective bargaining election within twelve months of another election held within the same unit. Section 9(c)(3), 29 U.S.C. § 159(c)(3). Other than this time bar there appear to be no significant impediments to the filing of a new election petition after an earlier petition has been dismissed. *See* Subpart C, Rules and Regulations, National Labor Relations Board.

C. *The Employee Influence Test Announced By The Court Below Will Effectively Nullify The Act's Coverage Of Professional Employees.*

During the hearings conducted prior to enactment of the Taft-Hartley Act Congress had before it emphatic testimony to the effect that professional employees generally were a part of management and should, accordingly, be excluded from the Act's coverage.[37] Congress rejected this advice when it enacted sections 2(12) and 9(b) of the Act, 29 U.S.C. §§ 152(11) and 159(b), respectively defining professional employees and providing them with presumtively separate bargaining units.[38]

Since the Taft-Hartley Act's extension of coverage to professional employees, the Board has consistently resisted

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[37] HEARINGS ON AMENDMENTS TO THE NATIONAL LABOR RELATIONS ACT BEFORE THE HOUSE COMM. ON EDUC. AND LABOR, 80th Cong., 1st Sess. 1225 (1947); HEARINGS ON S. 55 AND S.J. RES. 22 BEFORE SENATE COMM. ON LABOR AND PUB. WELFARE, 80th Cong., 1st Sess. 694 (1947). *And see* Finkin, *The Supervisory Status of Professional Employees*, 45 FORDHAM L. REV. 805 (1977).

[38] Section 2(12) of the Act defines professional employees as "(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or (b) any employee, who (i) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a)."

Section 9(b) confers on the Board broad discretion to decide on the appropriate bargaining unit: "Provided, That the Board shall not (1) decide that a unit is appropriate . . . if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit . . ."

the claim that professional employees, by virtue of their influence on management, are "managerial employees." For example, the Board held in *Westinghouse Electric Corp.*, 113 N.L.R.B. 337, 339-40 (1955):

> *While manufacturing engineers make recommendations on matters which are of great importance to management, that factor is usually present in the work of all professional employees, and does not in and of itself make them part of management so as to preclude their inclusion in a professional unit.* Indeed, this common factor, in our opinion, was one of the reasons why Congress specifically provided for the establishment of separate professional units. To justify the exlusion of individuals otherwise qualified for inclusion in a professional unit upon the ground that they are too closely allied to the employer to be regarded as employees under the Act, we believe that *it must be established that the individuals in question have interests and duties not shared by the other professionally engaged employees.* (Emphasis supplied.)[39]

And in *General Dynamics Corp.*, 213 N.L.R.B. 851, 857-858 (1974), the Board observed:

> Work which is based on professional competence necessarily involves a consistent exercise of discretion and judgment, else professionalism would not be involved. Nevertheless, *professional employees plainly are not the same as management employees either by definition or in authority, and managerial authority is not vested in professional employees merely by virtue of their professional status, or because*

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[39] *See also Westinghouse Electric Corp.*, 97 N.L.R.B. 1271, 1272 (1952) in which the Board, after noting that the employer's "methods engineers" make "no individual policy decisions on a policy level," held that "mere participation in conferences of supervisory personnel from which emerge some decisions based in part upon . . . recommendations [of the methods engineers] does not give [them] managerial status."

work performed in that status may have a bearing on company direction. Likewise, technical expertise in administrative functions which may involve the exercise of judgment and discretion does not confer executive-type status upon the performer. A lawyer or a certified public accountant working for, or retained by, a company may well cause a change in company direction, or even policy, based on his professional advice alone, which, by itself, would not make him managerial. (Emphasis supplied.)

The extension of the "managerial employee" exclusion to those individuals who exert an informed influence on their employer's policies runs directly against the Act's explicit coverage of professional employees. Section 2(12) itself expressly contemplates that professional employment involves the "consistent exercise of discretion and judgment." In so defining the professional employee, Congress doubtless understood that such employees—more than others—would regularly exert influence on their employers. And Congress gave professional employees separate bargaining units in order to protect their interest "in maintaining certain professional standards." S. REP. No. 105, *supra*, note 22, at 11.[40] To hold that an

[40] Professional employees create special problems for the institutions which employ them. More than most others, professional employees generally demand autonomy in their work and relative freedom from supervision. They expect their work to be judged by their peers, and they reject evaluation by non-professional managers even though they may occupy positions of bureaucratic authority. Moreover, the loyalties of professional employees are frequently divided between their discipline and their employer. *See e.g.*, Finkin, *The Supervisory Status of Professional Employees, supra*; W. Kornhauser, SCIENTISTS IN INDUSTRY, 201-202 (1962); Strauss, *Professionalism and Occupational Associations*, INDUSTRIAL RELATIONS (May 1963). These aspects of professionalism inevitably generate tensions between professional employees and managerial authority, tensions which are partially accommodated through the development of parallel and overlapping decision-making processes. As one commentator has observed:

"[The professional employee's] fondest wish is to be left alone; they make the point that in scientific work it seems rational to

employee's exertion of such influence makes him a "manager" beyond the protection of the Act will plainly frustrate the intent of this extension of coverage.

To be sure, professional employees may also be "managerial employees," just as managers may also be professionals. But managerial status derives from more than the mere exertion of influence on company policy. The engineer who tells the company how the bridge must be built, the architect who imposes the imperative of design on the wishes of the construction company, and the faculty member who insists on a major voice in curriculum decisions, do not exert the kind of influence which is contemplated as "managerial" under the Act.

The court below, of course, recognized the professional status of the faculty. It declined, however, to accept the Board's analogy of faculty influence to that exerted by other professionals, because, apparently, it believed that faculty influence on the educational enterprise is greater than the influence of professionals in industry. 582 F.2d at 698. But even assuming the validity of the court's conclusions as to the degree of the faculty influence at

do just that, that basic discoveries stem not from managerial direction but from the scientist following up his own initial hunches and the leads he develops as he proceeds. Management has found such men difficult to deal with; their morale suffers easily from traditional forms of management, and they present unusual demands on management to change and accommodate. *In this situation, professional authority and bureaucratic authority are both necessary, for each performs an essential function: professional authority protects the exercise of the special expertise of the technologist, allowing his judgment to be preeminent in many matters. Bureaucratic authority functions to provide coordination for the work of the technologists with the other major elements of the firm. Bureaucratic direction is not capable of providing certain expert judgments; professional direction is not capable of providing over-all coordination.*" Clark, *Faculty Organization and Authority*, in ACADEMIC GOVERNANCE, J. BALDRIDGE, ed. (1971) 243. (Emphasis supplied) *See also* BALDRIDGE, POWER AND CONFLICT IN THE UNIVERSITY (1971) 114.

Yeshiva, rights under the Act ought not depend on such subtle gradations in employee influence.

II. The Yeshiva University Faculty Are Not "Managerial Employees" And Are Entitled To The Full Protections Of The National Labor Relations Act.

A. *The Faculty Governance Role Does Not Bring Them Within The Board's Definition Of "Managerial Employees."*

Although the faculty at Yeshiva University, like their counterparts at many American colleges and universities, play an important role in the governance of their institution, the character of this faculty governance role is not that contemplated by the Board's definition of "managerial employees." That definition, as we have shown, see Part IA, pp. 11-14, *supra*, requires that "managerial employees" possess the discretion to "formulate, effectuate and determine" the policies of their employing institutions, and to do so from a position of "alignment" with management. Far from being so "aligned," the faculty are manifestly independent and separate from management. The court below appears to have recognized this when it observed that "most university facilities enjoy a state of *independence* and influence on policy which is 'entirely unknown among the professionals in private industry.'" 582 F.2d at 698 (Emphasis supplied; citations omitted.)

But the court below missed the import of this marked "independence" from management. Rather than perceiving that it tends to refute any claim that the faculty are aligned with their administration and governing board, the court held instead that faculty could not be compared to professionals in industry simply because their "independence and influence" are so much greater. 582 F.2d at 698. But a high degree of independence from management must operate to negate any claim of "managerial"

status, notwithstanding the fact that such independence is coupled with a high degree of influence.

The Board has frequently recognized that when the faculty makes its recommendations to the administration and governing board, it acts not for management but rather in its own professional interests. For example, in *Adelphi University*, 195 N.L.R.B. 639, 648 (1972), commenting on the status of elected members of faculty personnel committees which have "considerable and effective authority with respect to a wide range of actions affecting the status of the University's professional personnel," the Board observed:

> It is also clear that the board of trustees . . . has not attempted to convert the committees into managerial or supervisory entities. They are not advised to advocate management's interests in making their decisions, nor are they advised that they are management's representatives in making them.

Indeed, were faculty charged with speaking for management in making their recommendations, it would defeat the very purpose for which such advice is sought in the first place: management's need for the very best professional judgment possible on a variety of critical matters in which neither the administration nor the governing board enjoys any particular expertise.

Faculty independence from management is further evidenced by the fact that "faculty members are generally not held accountable by or to the administration for their faculty governance functions." *Northeastern University*, 218 N.L.R.B. 247, 257 (1975) (Member Kennedy, concurring.) Similarly, "[f]aculty criticism of administration policies . . . is viewed not as a breach of loyalty, but as an exercise in academic freedom." *Id.*

B. *Faculty Members' "Job Responsibilities" Do Not Include The Exercise Of Any "Managerial" Function, Though Considerable Faculty Influence Does Result From Their Specialized Expertise.*

The "job responsibilities" of the faculty member—at Yeshiva and elsewhere—are to teach and to carry out research. These responsibilities carry with them a high level of autonomy. The court below conceded as virtually self-evident the faculty member's "authority to determine the content of his course, the method he employs in teaching it, and the evaluation of his students' academic performance" and acknowledged that "these attributes of professionalism should not characterize them as managerial or supervisory." 582 F.2d at 697-98. Obviously, then, management relies heavily on faculty judgment in these important areas.

The court of appeals thus necessarily rested its finding of "managerial" status on faculty influence outside the classroom and laboratory. It is apparent that faculty advice and assistance are valued, arguably required, if higher education management is to reach intelligent decisions as to educational policy. Faculty members' expertise and first-hand knowledge of their disciplines and the demands of effective instruction and productive research is an indispensable resource in a university. This fundamental proposition is widely recognized. As the former Controller of Teachers College, Columbia University, observed, "the board [of trustees] in fulfilling its responsibilities for management, requires the aid of the faculty . . . because the Board does not, unaided, possess the best judgment in all matters involved." T. HUNGATE, MANAGEMENT IN HIGHER EDUCATION 66-67 (1964).[41]

[41] To similar effect is a leading study of academic governance:

> "Decision-making in the university must involve the teacher-researcher "on the assembly line" because he chiefly knows intimately what the "production" of the university is all about; it is his immediate proximity to the personal tensions of learning and scholarly creation which give legitimacy to much of the decision-making in the academic community." H. MASON, COLLEGE AND UNIVERSITY GOVERNMENT, 1 (TULANE STUDIES IN POLITICAL SCIENCE, VOL. XIV, 1972).

Faculty exercise their influence most consistently and effectively in the area of faculty personnel matters. Just as it is impracticable for higher education management to exercise control over the faculty member's activities in the classroom, library, or research laboratory, so too higher education management lacks the necessary expertise to evaluate the work of faculty members. As a result, the primary responsibility for faculty evaluation normally resides in the academic department whose members share a common discipline. And it is simply good management to rely heavily on the judgments which emanate from an individual's departmental colleagues.

Moreover, the faculty's influence on the establishment of admission and degree requirements is a straightforward extension of their acknowledged individual responsibility for the "evaluation of [their] students' academic performance." 582 F.2d at 697. The same is true of the faculty's role in decisions regarding the retention of marginal students.[42] Similarly, the faculty's natural interest in the University's curriculum, and the consequent reliance of the administration and governing board

[42] The court below commented on the fact that the decision to drop a student results in a tuition loss. 582 F.2d at 690-91. But the budgetary significance of this faculty activity—which is clearly related to their general authority to evaluate students—is no greater than in the case of individual faculty decisions to employ certain textbooks or to use laboratory facilities to teach a course. These are decisions which also have a marked budgetary significance but which the court below concluded would not render them managerial employees. *Cf. Western Electric Co.*, 100 N.L.R.B. 420, 422 (1952), where the Board held that an employer's stock maintainers were not managerial employees, though their performance was critically important, and their recommendations, or errors in their judgments, could easily impose a substantial cost on the employer.

on faculty advice in this area, flows directly from their professional expertise. Obviously, the faculty, more than any other component of the college or university community, knows what it can teach and what is worth teaching. And, equally obviously, the formulation of the curriculum is central to their professional concerns, quite apart from their unique expertise.

In sum, when the nature and extent of faculty influence are measured against the imperatives of faculty expertise, it is plain that their influence flows from this expertise and not from any "management" responsibility delegated to them by their governing board.

C. *Institutions Of Higher Education—Including Yeshiva University—Are Organized To Include A Discrete Managerial Function, Responsibility For Which Is Neither Vested In Nor Performed By The Faculty.*

It may well be that, in an ideal collegial system, with responsibility diffused throughout a body of peers, there is no separate management role. But this ideal collegial model, whether or not possible or desirable, does not now exist in American higher education.[43] Institutions of higher education have become complex and diversified enterprises which require an administrative hierarchy, responsible directly to the governing board and with a direct stake in the success of the institution as a whole, to provide overall direction and management for the university.[44] By contrast, most faculty members are possessed of intensely specialized expertise and are primarily concerned with teaching and research in their own disciplines.

The faculty of course have an interest in the success and well-being of the institution which employs them; certainly they will suffer the consequences if things go sour. But their professional commitments align them as much with their discipline and the nationwide community of scholars devoted to it as with their employing institution.[45] Faculty are not hired to manage the institution, but rather to contribute, through teaching and scholarship, to the institution's broader mission. It is the college or university president and his administrative aides who have the most immediate interest in and identity with the success of the enterprise and its day-to-day operation. And this interest and identity "concentrate[s] the *responsibility* for the success of the institution on the president and his staff." J. CORSON, THE GOVERNANCE OF COLLEGES AND UNIVERSITIES, 84 (rev. ed. 1975). (Emphasis supplied.)

Most of these functions do not involve the faculty. Most notably, the activities necessary to insure the financial soundness of the institution (i.e., fundraising, cost analyses, and the allocation of funds across the various components of the institution) are carried out by the president and his budget committee largely independent

[43] J. BALDRIDGE *et al.*, POLICY MAKING AND EFFECTIVE LEADERSHIP 17 (1978). *See also Adelphi University*, 195 N.L.R.B. 639 (1972).

[44] Yeshiva University is no exception. At the top of the administrative hierarchy is the President who is a member of and reports to the Board of Trustees. Under the President are Vice-Presidents for Academic Affairs and Student Affairs. Other administrative officers include the Registrar, Bursar, and Director of Admissions. For each of the University's schools there is a dean who serves as the chief administrative officer. In addition, there is an Executive Council, consisting of the deans and directors of various administrative divisions. The Council has jurisdiction over "all of the academic and administrative problems of the University." The Council is "primarily a recommending body," recommending policies and procedures "to the President who then issues directives." Finally, there is a budget committee, appointed by the President and consisting of the Vice-President for Business Affairs, the Registrar and a dean, with broad authority over the budget. *See* Labor Board Petition for Certiorari, at 4-5.

[45] BALDRIDGE *et al.*, *supra*, 22-23.

of the faculty. While faculty may sometimes be afforded a role in the allocation of funds within the educational program, this role often varies with the state of the institutional economy.[46] The decision that budget cutbacks must be undertaken to preserve the financial integrity of the institution is largely a management decision. On the other hand, what part of the educational program is to be cut is a professional decision—one where the faculty can be expected to play a major, and perhaps decisive, role by making recommendations which are accepted by management. At Yeshiva, for example,

> In response to growing budgetary limitations, a faculty committee on personnel and budget has made generally effective recommendations concerning elimination of elective courses, the establishment of joint courses, and other scheduling changes. 582 F.2d at 691.

Even in the areas of "academic" decision-making (*i.e.*, faculty personnel matters, curriculum changes, admission and degree-granting requirements and the like), where the faculty ordinarily play a major part, management plays a role separate and apart from the faculty. The decision-making process itself is structured at Yeshiva in a fashion which belies the attempt of the court below to characterize it as a homogeneous faculty-administration effort. It is true that some decisions, particularly faculty personnel decisions, are initiated by the faculty. But the faculty role consists of passing on to the administration their recommendations.[47] At the initial

[46] For example, the court below noted that, at Yeshiva, "[*u*]*ntil the budget cutbacks of the last few years* every aspect of the budget was deliberated by the [Chairmen's] Council." 582 F.2d at 693. (Emphasis supplied.)

[47] "While deference is paid to faculty judgment in areas where they are expert and in which they share a mutual professional concern, overall responsibility for the University's operation remains at all times with the administration and ultimately with the Board of Trustees." *Northeastern University, supra*, at 257 (Member Kennedy, concurring.)

stage the interaction between faculty and administration may in some cases be sufficiently close to warrant the conclusion that the two levels are acting in harmony and with considerable mutuality of interest.[48] But as the recommendations are passed on to higher administrative levels, the management responsibility becomes more clearly distinct. For example, an administrative decision to deny tenure may reflect budgetary constraints unrelated to the academic qualifications of the individual in question.

The responsibility of the administration is to manage the diversity which characterizes any institution of higher education. Possessed of faculty recommendations on a variety of matters from all quarters of the university, it is the job of the administration to weigh these recommendations against each other and to reconcile them with what is in their judgment the best interest of the institution as a whole. Just as the unique expertise of the departmental faculty requires that they play an integral part in the evaluation of their colleagues, so too the administration's knowledge of the overall needs of the institution makes it necessary that they possess overall responsibility for its day-to-day operations. This fundamental point, that responsibility and authority is vested in a discrete management corps, subject in turn to a governing board, is not altered by a heavy reliance on faculty advice or even by the delegation of some initiating responsibility to the faculty.

[48] Academic deans, generally regarded as the "front line" of management, often have a close identity with the faculty and with their own academic discipline. They frequently view their deanship as a temporary withdrawal from their primary academic interests. *See* CORSON, *supra*, at 83.

CONCLUSION

For the foregoing reason the decision of the court of appeals should be reversed and the Labor Board's order, requiring Yeshiva University to bargain with its full-time faculty, enforced.

Respectfully submitted,

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APPENDIX

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This appendix is comprised of representative provisions from collective bargaining agreements covering bargaining units consisting chiefly of full-time faculty at privately supported institutions of higher education. Part I contains provisions relating to faculty participation in what are generally referred to as matters of academic governance: curriculum, degree requirements, admission requirements, the grading system, teaching loads and budgetary matters. Part II summarizes provisions relating to faculty participation in matters relating to faculty status: initial appointments, reappointments, promotion and tenure.

The full texts of the agreements cited in this Appendix are available through the Bureau of National Affairs, Washington, D.C. or the National Center for the Study of Collective Bargaining in Higher Education, 155 East 24th Street, New York, New York.

Except where otherwise indicated, each of the bargaining relationships covered by this Appendix was established following an NLRB-conducted election.

I. GENERAL "GOVERNANCE" PROVISIONS

Fairleigh Dickinson University (New Jersey)—

> The Agreement establishes faculty "governance" committees on departmental, college and campus levels charged with advising the administration on a wide range of matters of educational policy. For example, the Agreement creates, for each college, a College Educational Planning Committee which is, among other things, "to engage in short-term and long-term planning for the college," review curricular recommendations, and "propose educational policies, college-

wide academic standards and requirements, admissions standards, and criteria and standards for honors work within the college . . ." (Article 11)

The Agreement also provides for a campus-wide faculty Committee on Buildings and Grounds, which, among other things, is to "participate in the planning and development of new building construction and major alternatives to existing buildings and grounds." (§ 8.86)

The Agreement provides for faculty participation in the selection of administrators, up to and including the President. (Article 14)

The Agreement provides for the establishment of a "University Commission," made up largely of faculty members, when, "in the view of the President, the University's problems are of such magnitude and complexity as to be inappropriate for examination by any college or campus planning agency. . ." (Article 17)

Adelphi University—

The Agreement provides that the faculty Constitution "shall provide continuance of existing rights, privileges, and responsibilities of the faculty to participate directly through the Senate in its own governance and in the initiation of the decisions on educational policy and standards within the University." (Article VI)

Antioch College School of Law—

The Agreement gives faculty non-voting representation on the Board of Trustees. (Article XXII)

Ashland College (Ohio)—

The Agreement creates a joint Board of Trustees/faculty committee to assess the college's financial condition. If reductions in faculty positions are deemed necessary, the agreement requires prior consultation with the faculty senate.

Dowling College [1] (New York)—

Faculty are responsible under the Agreement for making recommendations regarding the operating budget and course offerings of their respective divisions. A joint faculty-administration senate has "full authority and responsibility" to determine admissions policies, approve the granting of degrees, award sabbatical leaves, approve the curriculum, and to establish the policy regarding the disbursement of financial aid and scholarship funds. (Article III)

Marymount College (New York)—

The Agreement states that the College Board of Trustees and President "are aware of the necessity for involving faculty in genuine participation in decisions covering educational policy . . . [and recognize] the necessity of faculty participation in educational policies which the faculty will be largely responsible for implementing."

Noting that the Board and President "reserve the right of veto on all matters," the Agreement establishes the "President's Council," consisting of the President, two deans, four faculty members and three students. The Council is to make

[1] This bargaining relationship was established by voluntary recognition.

recommendations regarding the instructional budget, long range planning, tuition and fees and the College's several goals and priorities. (B2.31)

Rider College [2] (New Jersey)—

The Agreement establishes faculty committees on the school and college level with the responsibility to "develop academic policy proposals on such items as curriculum, graduation requirements, . . . and other matters of an academic nature traditionally handled by the faculty . . ." (Article XI)

St. John's University [3] (New York)—

The Agreement provides that the "faculty has primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process. . . . The primary responsibility of the faculty for such matters is based upon the fact that its judgment is central to general educational policy." (Article II)

The Agreement provides for faculty participation in the selection of deans. (Article VIII) The Agreement expressly provides that either the faculty or the administration may "initiate action" to eliminate or reduce academic programs or departments, with ultimate authority residing in the Board of Trustees. (Article XIX)

[2] This bargaining relationship was established by voluntary recognition.

[3] This bargaining relationship was established after an election conducted pursuant to the provisions of New York's "little Wagner Act."

University of Detroit—

The Agreement requires prior consultation with faculty prior to any decision to reduce the number of faculty positions. (Article VII)

University of Dubuque—

The Agreement establishes a "Program Development Committee," consisting of three faculty members, the Dean and one student, to make recommendations to the Dean regarding curriculum, teaching assignments and new degree programs. (Article 33)

The Agreement also establishes a similarly constituted "Institutional Advancement Committee" which is to consult with the University administration regarding budgetary decisions, proposals to reduce faculty positions and significant capital improvement programs. (Article 35)

Utica College of Syracuse University—

The Agreement establishes a curriculum committee, consisting of five faculty members, one librarian and one administrator, to recommend course changes, credit hour changes and standards and policies governing all permanent courses and curricula. (Article VIII)

The Agreement establishes an "Academic Standards Committee," consisting of six faculty members, which makes recommendations to the President regarding admission and degree requirements. (Article VIII)

Wagner College (New York)—

The Faculty Handbook, incorporated by reference into the Agreement, provides for a "Faculty Council," consisting of nine faculty members

and the President and Academic Vice President, *ex officio*, with responsibilities to oversee and evaluate the academic program, receive and evaluate reports of faculty committees, and "act as a channel of communication between the administration and the faculty in regard to the framing and execution of long-range plans, basic decisions regarding existing and prospective physical resources, and budgetary matters." The Faculty Handbook also provides for faculty committees with responsibilities over, among other things, admission policies, grading policies, degree requirements, curriculum, and faculty workload.

Bard College (New York)—

The Agreement provides that "the existence of a financial exigency which may warrant the termination of a continuous appointment shall be determined by the mutual agreement of the President and the Executive Committee of the [faculty union]." (Article VII)

University of Bridgeport—

The Agreement provides for the creation of a "University Productivity Committee," consisting of three people appointed by the President and three by the faculty union. The Committee is to review and approve "productivity" plans submitted to it by the colleges within the University. (Article 9)

The Agreement further provides that "[t]he University shall not implement any personnel decision affecting a member of the bargaining unit which is made for financial reasons unless the decision is pursuant to a college plan approved by the UPC." (Article 9)

II. CLAUSES GOVERNING DECISIONS RELATING TO FACULTY STATUS

Antioch College School of Law—

Initial appointments to faculty positions are not to be made without "prior approval by a majority vote of the faculty." (Article XIII)

Bloomfield College (New Jersey)—

Initial appointments to faculty positions are not to be made without approval of a majority of the faculty members in the candidate's discipline. Faculty to play "the major role" in all decisions relating to faculty status. (Article V)

Dowling College (New York)—

The faculty, through division coordinators, are responsible for making recommendations regarding the hiring of full- and part-time faculty. (Article III)

Hofstra University—

The Agreement establishes detailed procedures whereby faculty, through a committee structure, make recommendations to the University administration regarding the appointment, reappointment, promotion and tenuring of faculty. The Agreement further requires the administration to give "great weight" to such recommendations. (Article VI)

Long Island University (Brooklyn Center)—

The Agreement provides that "[t]he responsibility for evaluating the credentials and performance of faculty members and for determining their eligibility for appointment, reappoint-

ment, promotion, and tenure rests principally with the faculty." The Agreement further provides that "the recommendations of the Faculty Review Committee will be followed except for compelling reasons . . ." With regard to initial appointments, the agreement provides that "all applicants for available . . . faculty positions shall be reviewed and approved by a majority of the qualified voters of the department . . ." (Article VII)

Loretto Heights College (Colorado)—

The Agreement creates a Standing Committee on Tenure which is to make recommendations to the College President regarding candidates for tenure. The President must state his reasons in the event of disagreement with the Committee and meet with it, if requested, to discuss those differences. (Article V)

Marymount College (New York)—

The Agreement establishes a faculty rank and tenure committee charged with reviewing and making recommendations regarding matters of promotion, tenure, emeritus status, and sabbatical leaves. (Article A1)

New York Institute of Technology [4]—

With regard to initial appointments to faculty positions, the agreement provides that a Departmental Personnel Committee "shall conduct the search for and the evaluation of applicants . . ." (Article XI) These Committees are also responsible for making recommendations regarding reappointment and promotion decisions. (Article XII)

[4] This bargaining relationship was established following an election conducted under the provisions of New York's "little Wagner Act."

Rider College [5] (New Jersey)—

The Agreement establishes a Promotion and Tenure Committee made up of an equal number of administrators and tenured faculty members. This Committee receives departmental recommendations on promotion and tenure decisions and forwards its own recommendations to the College's Board of Trustees. Both the Committee and the Board of Trustees are enjoined not to "arbitrarily substitute their judgments on the professional expertise of the candidate for properly documented judgments presented in the departmental recommendation." (Article VI)

St. John's University [6] (New York)—

The Agreement provides that initial appointment decisions are to be made by the departmental personnel and budget committee. (§ 5.1) Where the President wishes to "infuse new life into a department," he may designate the desired qualifications and, on the failure of the departmental committee to recommend an acceptable candidate, the President may make the appointment himself. (§ 5.5)

University of Bridgeport—

The Agreement provides that "[s]ubject to review by the President of the University, the faculty shall have primary responsibiilty with regard to all academic appointments, renewals or non-renewals of such appointments, promotion, and tenure. On such matters, the President shall concur with the faculty judgments

[5] See note 2, *supra*.

[6] See note 3, *supra*.

except in rare instances and exceptional circumstances for compelling reasons written in detail which shall not be arbitrary nor capricious." (Article 8)

University of Detroit—

The Agreement provides for the creation of a Faculty Status and Promotion Committee with responsibility for making recommendations to the administration concerning promotion and tenure decisions. (Appendix A)

Lowell Technological Institute—

Initial appointments to faculty positions are to be made by recommendation of the faculty. When recommendations are rejected, the process is repeated. (Article E) The Agreement also provides for the establishment of a Faculty Tenure Committee to make recommendations to the President regarding "tenure and removal from position." (Article D)

Utica College of Syracuse University—

The Agreement establishes a Faculty Affairs Committee to make recommendations regarding promotion, tenure, and reappointment decisions. In the event of irreconcilable differences between the Committee and the College President, both recommendations are submitted to the University Chancellor for final decision. (Article VIII)

Fairleigh Dickinson University (New Jersey)—

The Agreement sets forth a detailed and elaborate structure of faculty committees charged with responsibility for making and reviewing recommendations regarding appointment, reappointment, promotion and tenure. (Articles 10, 11)